Due service and receipt of a copy of the within is hereby admitted

this_____day of November, 1938.

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Attorney for Respondents.

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Attorneys for Petitioners.
The Pullman Company, H. J. Hatch
and Edward E. Myers.

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 210

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Appellants,

vs.

MRS. GARNETT V. JENKINS and ROBERT L. JENKINS, by MRS. GARNETT V. JENKINS, Guardian *Ad Litem*,

Respondents.

RESPONDENTS' REPLY BRIEF.

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STATEMENT OF THE CASE.

This is an action to recover damages for the wrongful death of Robert L. Jenkins, a passenger conductor employed by the Southern Pacific Company, a railroad corporation. On March 29, 1935, he was in charge of a train known as "The Lark." Somewhere between Oxnard and Ventura, California, he received an urgent call from the Pullman conductor of said train, H. J. Hatch, one

of the appellants herein, to quell a disturbance in the sleeping car. This disturbance was caused by one A. J. Kash, also an appellant herein, who, being very intoxicated, was in a quarrelsome and fighting mood, uttering obscenities, annoying the women passengers and, in general, being extremely objectionable. Although repeatedly requested by Hatch and Jenkins to desist, Kash refused to cease his objectionable conduct and Jenkins, in his capacity as conductor of the train, called upon the Ventura police to eject Kash. Police officers boarded the train and proceeded to lead Kash off the train, but as they were doing so, Kash turned and struck Jenkins a severe blow on the head. The force of the blow caused a hemorrhage of the right frontal lobe of the brain, together with sub-dural hemorrhage and, as a result thereof, Jenkins died on April 19, 1935.

An action was thereafter commenced in the Superior Court of the State of California, in and for the County of Los Angeles, by Mrs. Garnett V. Jenkins, the widow of Robert L. Jenkins, for herself, and as guardian of the minor child of herself and the deceased, Robert W. Jenkins, against the Southern Pacific Company, the Pullman Company, A. J. Kash, H. J. Hatch, Edward E. Myers and Fred M. Dolsen on the 27th day of September, 1935. [Tr. pp. 1, 10.] Thereafter, and on the 25th day of November, 1935, a first amended complaint was filed in the state court. [Tr. pp. 10, 20.] In said first amended complaint, the plaintiffs allege that they bring said action under and by virtue of Chapter II.

Section 51, Title 45 of the United States Code, and therein allege the substance of the Federal Employers' Liability Act. [Tr. p. 16, par. 14.] Thereafter, and on the 8th day of February, 1936, the plaintiffs filed their second amended complaint in the United States District Court by reason of the fact that the demurrer of appellant, H. J. Hatch had been filed and sustained to the first amended complaint. [Tr. p. 31.] It was later stipulated between the parties, that Mrs. Garnett V. Jenkins, administratrix of the estate of Robert L. Jenkins, deceased, was to be substituted as party plaintiff in the place and stead of Mrs. Garnett V. Jenkins and Robert W. Jenkins by Mrs. Garnett V. Jenkins, his guardian *ad litem*. The cause was then removed to the District Court of the United States, in and for the Southern District of California, Central Division, over the objections of the respondents. On December 28, 1936, the cause was dismissed as to defendants Southern Pacific Company and Fred M. Dolsen. On December 29, 1936, the cause was called for trial by the court, a jury having been waived by all parties. At that time, Hatch, Kash and the Pullman Company obtained leave of court to file supplemental answers in which they alleged that the controversy had been compromised and settled by reason of the fact that the plaintiffs had executed to the Southern Pacific Company and Fred M. Dolsen, a "Covenant Not To Sue" and that the action had been dismissed as to said defendants. The covenant and dismissal were offered in evidence. Also admitted were the "Petition For Confirma-

tion Of Administratrix' Covenant Not To Sue." No oral testimony was taken. On the basis of these documents, the court dismissed the action on the ground that the covenant entered into by the plaintiffs with the defendants, Southern Pacific Company and Fred M. Dolsen, released the joint tort feasors and such release inured to the benefit of all of the defendants.

Plaintiffs then appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court reversed the judgment of the United States District Court upon the sole ground that said District Court had no jurisdiction to hear and determine the cause.

The petition of the Pullman Company and Kash for a rehearing in the Circuit Court of Appeals was denied and thereafter a petition for a writ of certiorari to the United States Supreme Court was made and granted.

QUESTION INVOLVED.

The sole question before this Honorable Court is one of jurisdiction—that is to say, whether or not in an action brought under the Federal Employers' Liability Act and commenced in a state court, the defendants may remove to the Federal Court where the causes of action stated in the complaint were not severable.

ARGUMENT.

I.

The District Court Had No Jurisdiction to Hear and Determine This Cause.

The sole question involved before this Honorable Court is one of jurisdiction. There was nothing else decided in the Circuit Court of Appeals but the question of jurisdiction. There was no action by the Circuit Court of Appeals on any other question. This Honorable Court should not consider the merits or other questions which were not passed upon by the Circuit Court of Appeals until the Circuit Court of Appeals had rendered some decision on them. Therefore, appellants should not be permitted to argue a question which was not ruled upon or decided by Circuit Court of Appeals. It would therefore appear to respondents that this Honorable Court should consider only the question of jurisdiction. The appellants urge and insist that this Honorable Court pass upon the merits of the cause, notwithstanding the fact that the United States Circuit Court of Appeals did not consider or pass upon the merits of the case. The respondents certainly would be entitled to be apprised of the Circuit Court of Appeals' position on the question of the merits and should have an opportunity to argue said question. As it stands now, there is no decision on the merits on which either the appellants or respondents could argue.

The appellants seek to have this Honorable Court review the cause at bar on its merits on the authority of

Story Parchment Company v. Patterson Parchment Paper Company, 282 U. S. 555. This cause in question is not authority for appellants' view for several reasons—first the lower court considered and ruled on the question which came before this Honorable Court and, secondly, they do not seek to overthrow the judgment of the lower court, but sustain it. (*Story Parchment Company v. Patterson Parchment Paper Company*, 282 U. S. 555 at 560.) On appeal from the District Court to the Circuit Court of Appeals, the judgment was vacated and the case remanded to the trial court, with directions to enter judgment for respondents *upon the ground that the petitioner had not sustained the burden of proving that it suffered recoverable damages.* (*Story Parchment Company v. Patterson Parchment Paper Company*, 282 U. S. 555 at pp. 559-560.) In the case here before this Honorable Court, the Circuit Court of Appeals passed on one question and that was—the jurisdiction of the trial court and, therefore, that is the only question which can be raised before this Honorable Court. Respondents contend that when the first and second amended complaints were filed, the cause was not severable. Therefore, under said circumstances it was the duty of the court below to have remanded the cause to the state court. We find conclusive support in 28 U. S. C. A., section 80, which provides, in part, as follows:

> "If in any suit * * * removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district

court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * * the said district court shall proceed no further therein, but shall * * * remand it to the court from which it was removed." (*Jenkins v. Pullman Co.*, 96 Fed. (2d) 405 at 410.)

It is familiar law that the right of removal being statutory, an action commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. *Little York Gold Washing Co. v. Keyes*, 96 U. S. 199.

When the plaintiff's allegations show a cause of action under the Federal Employers' Liability Act, all other rights of action in the field of interstate commerce are excluded, (*New York Cen. R. R. Co. v. Winfield*, 244 U. S. 147) and the provisions of the Federal Act must control even though the cause is expressly based upon another ground.

San Antonio & E. P. R. R. Co. v. Schendel, 267 U. S. 287;

Moore v. Chesapeake & Ohio R. R. Co., 291 U. S. 205;

Grand Trunk Western Co. v. Lindsay, 233 U. S. 427.

It is true that on the problem of removal raised when a plaintiff pleads a non-removable cause under the Federal Employers' Liability Act for injuries received in interstate commerce and a removable cause under state law that the cases in the lower federal courts are in some confusion. The results have been supported on the one hand by arguing that the right to remove may not be defeated by joinder with a non-removable cause. On the other hand, it is commonly held that the state court has jurisdiction whenever the Act enters into a case.

In *Jones v. Southern R. R. Co.*, 236 Fed. 584, an action arising under the Act in which the District Court ordered the case remanded, the court said:

> "Cases brought in the state courts under this Employers' Liability Act are not removable. The amendment of April 5, 1910, (Comp. St. 1913, sec. 8662), *supra*, provides that:
>
> " 'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no (cause of action) arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'
>
> "There is a motion to remand on the ground that this case is brought under the Employers' Liability Act of Congress and consequently is not removable.
>
> "The question involved here has been before the District Court several times. The first case directly and squarely in point was the case of *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768. The opinion in this case is by District Judge Hand of the Southern District of New York . . .
>
> " 'Employers' Liability Act, sec. 6, provides that an action may be brought for injuries to, or death

of, employees within such act in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action, but that the jurisdiction of the courts of the United States shall be concurrent with those of the several states, and no case arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. Held that, *where an action under such statute is brought in a state court, it is not removable in spite of the diversity of citizenship of the parties.*'" (Italics ours.)

"The second case is decided by Judge Ray of the Northern District of New York. His ruling agrees with that of Judge Hand and after stating his reasons, which appear in the opinion, he granted a motion to remand. *Rice v. Boston M. R. R.*, 203 Fed. 580 . . .

"Another case was decided by Judge Ray in the Northern District of New York. *Peek v. Boston & M. R. R.*, 233 Fed. 448. In the decision in this later case, Judge Ray says:

"'If this complaint contains two causes of action, one under the Federal Employers' Liability Act and one under the state law, the Federal Employers' Liability Act controls, as both plaintiff and defendant were engaged in interstate commerce, and, Congress having legislated on the subject, the federal statute is paramount. The federal statute controls the liability and right of recovery—referring to several authorities, among them, *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.'"

II.

The Causes of Action Stated in the Complaint Were Not Severable.

It is the earnest contention of respondents that a cause of action under the Federal Employers' Liability Act was stated in the complaint. The fact that another independent cause of action was joined therewith did not defeat respondents' right to have the case tried in the state court. In this connection, the Federal Employers' Liability Act provides that "No case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

45 U. S. C. A., Sec. 56.

At the time that the order of removal was made by the state court there was on file the amended complaint, [Tr. pp. 10-20] which complaint clearly stated a cause of action under the Federal Employers' Liability Act. In an action in tort, the cause of action is whatever the plaintiff declares it to be in his pleading and when concurrent negligence is charged, the controversy is not separable. The plaintiffs' purpose in joining individual defendants, is immaterial in the absence of a charge of fraud at the time of the motion to remove.

Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131;

Chicago R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184.

A railroad corporation may be jointly sued with its employees when it is sought to make the corporation liable by reason of their negligence. Such a suit is not removable by the corporation as a separate controversy even though the amount involved is within the jurisdiction of the federal court and the requisite diversity of citizenship exists between the company and the plaintiff.

Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206.

It is, of course, not contended by the appellants that the plaintiffs here could not have proceeded either jointly or severally against those liable for the injury. There is nothing in the federal removal statute which converts such an action, that is, one in which the plaintiff may proceed either jointly or severally, into a separable controversy for the purposes of removal, because of the presence of a non-resident defendant properly joined therein under the law of the state wherein the defendant company is conducting operations.

Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Bohon, 200 U. S. 211.

It must be borne in mind that the amended complaint unquestionably stated a cause of action under the Federal Employers' Liability Act. Assuming for the purpose of discussion, that appellants are correct in stating that the amended complaint was filed subsequent to the order of removal, there is, nevertheless ample authority to sustain the proposition that the subsequent amendment to the complaint related back to the time of the original complaint. For example, in *New York Central Ry. Co. v. Kinney*, 260 U. S. 340, it was held that where a com-

plaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, an amendment alleging that the parties at the time of the injury were engaged in interstate commerce does not introduce a new cause of action.

See also,

Chicago, R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184,

in which the complaint was amended *after* the motion to remove had been made.

In *Missouri, Kan. & Tex. Ry. Co. v. Wulff*, 226 U. S. 570, the court allowed an amendment alleging that plaintiff sued in the capacity of administrator and held that such amendment related back to the time of the original complaint.

This case is likewise important for the light which it sheds on the argument of appellants that the action should have been brought by the administratrix in the first instance. As a matter of fact, the record [Tr. p. 27] shows that a stipulation substituting Mrs. Jenkins as administratrix was accepted by all parties, though it was disregarded by them subsequently. However, that may be, in *Missouri, Kan. & Tex. Ry. Co. v. Wulff*, 226 U. S. 570, a similar situation was presented to the court. The court said:

> "The argument for reversal rests wholly upon the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition

failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. Second

Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

"It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co. v. Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us: an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within section 954, Rev. Stat."

Under these circumstances, respondents earnestly contend that it sufficiently appeared that the cause of action was not severable when the second amended complaint was filed. It was, therefore, the duty of the District Court to remand the cause back to the state court because it appeared after the suit had been removed that there was no substantial dispute properly within the jurisdiction of the District Court.

28 U. S. C. A., 80.

Nor did the respondents waive any right to remand the cause back to the state court because if, as a matter of fact, the District Court had no jurisdiction to hear and determine the case, plaintiffs could not confer jurisdiction upon said court by any waiver. The court of its own motion should have remanded the cause to the state court. *McNutt v. General Motors etc. Corp.*, 298 U. S. 178; *Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413.

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals is correct and that the District Court had no jurisdiction to hear and determine the cause since the causes of action were not severable and fell within the provisions of the Federal Employers' Liability Act requiring the state court to entertain jurisdiction.

If this Honorable Court believes that respondents should argue the merits of the case involving the covenant not to sue as argued by appellants, in a printed brief, in addition to what we have hereinabove said, then we request the Honorable Court to grant us a reasonable time to have an additional brief printed on said question.

Respectfully submitted,

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Due service of the within Brief is hereby acknowledged this.....day of November, A. D., 1938.

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Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1938.

The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, Petitioners,
vs.
Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 16, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question is whether petitioner, the Pullman Company, was entitled to remove this cause to the federal court. The Circuit Court of Appeals, reversing the District Court, ordered remand (96 F. (2d) 405) and because of conflict in the ground of its ruling with decisions of this Court, we granted certiorari. October 10, 1938.

Respondent, Mrs. Jenkins, and her son Robert W. Jenkins, by Mrs. Jenkins as guardian *ad litem*, brought this action on September 27, 1935, in the Superior Court for Los Angeles County, California, to recover damages for injuries causing the death of her husband. He was employed by the Southern Pacific Company as conductor of a train running from Los Angeles to San Francisco. His injuries were due to a blow struck by A. J. Kash, who was being removed from the train by police officers called to assist the conductor in ejecting Kash because of his disorderly conduct. The suit was brought against the Southern Pacific Company, the Pullman Company, Kash, Hatch, the Pullman conductor, John Doe One, described as employed by the Pullman Company as porter, and John Doe Two, described as employed by the Southern Pacific Company as gate tender at the passenger depot at Los Angeles.

The complaint alleged two causes of action, one against all the defendants, the other against Kash alone. The plaintiffs and defendant Kash were stated to be residents of California. The Southern Pacific Company was described as a Kentucky corpora-

tion and the Pullman Company as an Illinois corporation. The residences of the defendants Hatch and John Doe One and John Doe Two were not set forth.

On November 20, 1935, the Pullman Company, as a citizen and resident of Illinois, insisting that the controversy as to it was a separable one, filed its petition for removal to the federal court, with bond; and on November 25, 1935, the petition and bond were approved and removal was ordered. On the day on which that order was entered, an amended complaint was filed in the state court which contained the allegation that the action was brought against the Southern Pacific Company under the Federal Employers' Liability Act. 45 U. S. C. 51. On December 27, 1935, Mrs. Jenkins as administratrix of the estate of the decedent was substituted as plaintiff. On January 17, 1936, the defendant Hatch demurred to the amended complaint upon the ground that it stated no cause of action against him, and on January 29, 1936, the demurrer was sustained.

On January 22, 1936, the plaintiffs moved to remand, stating that Edward E. Meyers, the Pullman porter, sued as John Doe One, had been served with process on January 14, 1936, and that he and the defendant Hatch were residents and citizens of California, and that the action as against them and the Pullman Company was not a separable controversy. Pending this motion, on February 5, 1936, the plaintiffs filed in the federal court a second amended complaint identifying Meyers as the Pullman porter and Fred M. Dolsen as John Doe Two, described as the Southern Pacific gate tender. This amended complaint repeated the allegation that the Southern Pacific was sued under the Federal Employers' Liability Act. On February 19, 1936, the court denied the motion to remand.

On December 28, 1936, the action was dismissed as against the Southern Pacific and Dolsen as the result of a compromise. Supplemental answers were then filed by the remaining defendants respectively claiming release by reason of the agreement with the Southern Pacific. The District Court sustained this defense and entered judgment dismissing the complaint.

On appeal, the Circuit Court of Appeals, passing the other questions, held that if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed and hence that the District Court erred in denying the motion to remand. 86

F. (2d) p. 410. This ruling was placed upon an erroneous ground. The second amended complaint should not have been considered in determining the right to remove, which in a case like the present one was to be determined according to the plaintiffs' pleading at the time of the petition for removal. *Barney* v. *Latham*, 103 U. S. 205, 213-216; *Graves* v. *Corbin*, 132 U. S. 571, 585; *Louisville & Nashville R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Salem Company* v. *Manufacturers' Company*, 264 U. S. 182, 189, 190; *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 294, 295.

The question then is whether the original complaint set forth a separable controversy between the plaintiffs and the Pullman Company, that is, a controversy "which is wholly between citizens of different States, and which can be fully determined as between them". 28 U. S. C. 71. If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal. *Barney* v. *Latham*, *supra*; *Nichols* v. *Chesapeake & Ohio R. Co.*, 195 Fed. 913, 915, 916; *Stewart* v. *Nebraska Tire & Rubber Co.*, 39 F. (2d) 309, 311; *Des Moines Elevator Co.* v. *Underwriters Grain Association*, 63 F. (2d) 103, 105; *Culp* v. *Baldwin*, 87 F. (2d) 679, 680-682.

This is so whether the action sounds in contract or in tort. The question is determined by the plaintiff's pleading. Thus if defendants are charged with negligence, but the charge against the non-resident defendant is based on different and non-concurrent acts of negligence and a cause of action which is joint in character is not alleged, a separable controversy is presented. See *Culp* v. *Baldwin*, *supra*. Where, in the absence of clear proof of bad faith in the joinder, concurrent acts of negligence on the part of the defendants sued as joint tort-feasors are sufficiently alleged, a separable controversy is not presented and the fact that the defendants might have been sued separately affords no ground for removal. This rule is applied where a non-resident employer and its resident employee, whose negligence caused the injury, are sued jointly. *Chesapeake & Ohio R. Co.* v. *Dixon*, 179 U. S. 131, 139; *Alabama Southern R. Co.* v. *Thompson*, 200 U. S. 206, 212, 213, 220; *Chicago, R. I. & P. R. Co.* v. *Dowell*, 229 U. S. 102, 111-113; *Hoy* v. *May Company*, 271 U. S. 318, 321, 322; *Watson* v. *Chevrolet Motor Co.*, 68 F. (2d) 686, 689; *Harrelson* v. *Missouri Pacific Transportation Co.*, 87 F. (2d) 176, 177.

In the instant case, the original complaint did not charge any negligence or wrongful conduct in ejecting Kash from the train. On the contrary, it was alleged that he was intoxicated and was acting in an offensive, threatening and quarrelsome manner in which he persisted despite remonstrance. There was clearly a separable controversy with respect to Kash. He was sued for his unlawful assault upon the conductor.

The negligence charged against the Southern Pacific Company and its gate tender was in the action of the latter in permitting Kash to enter the station and go through the gates to board the train without displaying his ticket and while drunk and disorderly. The negligence charged against the Pullman Company and its porter was alleged to consist in the action of the porter in permitting Kash to board the Pullman sleeper. No facts were alleged upon which liability of the Pullman Company and its employee could be predicated upon the negligence of the Southern Pacific Company and its gate tender. It was not shown that either the Pullman Company or the Southern Pacific Company was liable for the acts of the other or that they joined in the commission of any wrong. With respect to these companies in relation to each other, the cases above cited, so far as they hold that a separable controversy is not presented when master and servant are joined because of concurrent negligence, are not in point.

Nor was any negligence or wrongful act alleged on the part of the Pullman conductor.

The question, however, remains as to the effect of the joinder of the Pullman porter. If the porter had been sued in his proper name, instead of John Doe, had been described as a citizen of California, and had been served with process prior to the petition for removal, there could be no question that the Pullman Company would not have been entitled to remove. *Chesapeake & Ohio R. Co.* v. *Dixon, supra; Alabama Southern R. Co.* v. *Thompson, supra; Hay* v. *May Company, supra.*

We think that the fact that the Pullman porter was sued by a fictitious name did not justify removal. His relation to the Pullman Company and his negligence as its servant were fully alleged. See *Grosso* v. *Butte Electric R. Co.*, 217 Fed. 422. Nor does the fact that the residence of the porter was not set forth justify disregarding him. It was incumbent upon the Pullman Company to show that it had a separable controversy which was wholly between citizens of different States. As in determining whether there was

such a separable controversy with respect to the Pullman Company its porter could not be ignored, the Company was bound to show that he was a non-resident in order to justify removal.

At the time of the petition for removal the Pullman porter had not yet been served with process. Where there is a non-separable controversy with respect to several non-resident defendants, one of them may remove the cause, although the other defendants have not been served with process and have not appeared. *Tremper* v. *Schwabacher*, 84 Fed. 413, 416; *Bowles* v. *H. J. Heinz Co.*, 188 Fed. 937; *Hunt* v. *Pearce*, 271 Fed. 498; 284 Fed. 321, 323, 324; *Community Building Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678; *Trower* v. *Stonebraker-Zea Co.*, 17 F. Supp. 687, 690; *Kelly* v. *Alabama-Quenelda Co.*, 34 F. (2d) 790, 791. In such a case there is diversity of citizenship, and the reason for the rule is stated to be that the defendant not served may never be served, or may be served after the time has expired for the defendant who has been served to apply for a removal, and unless the latter can make an effective application alone, his right to removal may be lost. *Hunt* v. *Pearce*, 284 Fed. p. 324. But the rule is otherwise where a non-separable controversy involves a resident defendant. In that case the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant. *Patchin* v. *Hunter*, 38 Fed. 51, 53; *Armstrong* v. *Kansas City Southern R. Co.*, 192 Fed. 608, 615; *Hunt* v. *Pearce*, 271 Fed. p. 502; *Del Fungo Giera* v. *Rockland Light & Power Co.*, 46 F. (2d) 552, 554; *Hane* v. *Mid-Continent Corporation*, 47 F. (2d) 244, 246, 247. It may be said that the non-resident defendant may be prejudiced because his co-defendant may not be served. On the other hand there is no diversity of citizenship, and the controversy being a non-separable one, the non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove. *Wecker* v. *National Enameling Co.*, 204 U. S. 176, 185, 186; *Chesapeake & Ohio R. Co.* v. *Cockrell*, 232 U. S. 146, 152; *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 97; *Clancy* v. *Brown*, 71 F. (2d) 110, 112, 113.

In the instant case there was no charge that the joinder was fraudulent. On the motion to remand it appeared that the Pullman porter, identified as Meyers, was a resident of California and had then been served with process.

We conclude that the District Court erred in denying the motion to remand and that the judgment of the Circuit Court of Appeals should be affirmed.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1938.

The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, Petitioners,
vs.
Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 16, 1939.]

Mr. Justice Black, concurring.

I agree that it was incumbent upon the Pullman Company, seeking removal, to show that it was sued in a controversy "wholly between citizens of different States;"[1] that the Company failed to meet this burden; that plaintiff's joining the Pullman Company with a Pullman porter designated by a fictitious name did not relieve the Company of its statutory burden; that consequently the District Court erred in denying a motion to remand, and that the judgment of the Circuit Court of Appeals, reversing the District Court's refusal to remand, should be affirmed. To certain portions of the opinion, which this affirmance does not require, I cannot agree.

First. The original complaint filed in the State court indicated plaintiff's intention to rest its case against the Southern Pacific Company upon the Federal Employers' Liability Act, under which suits brought in State courts are not removable to Federal courts.[2] The pleadings did not disclose that the suit was based on the Federal Act as clearly as good pleading requires, and the complaint was doubtless subject to special demurrer because of its generality. But the mere fact that a complaint based on the Federal Act is demurrable does not make it subject to removal. In addition, both an amendment filed in the State court before the order of removal (but after the petition for removal), and a second amendment filed after removal, served to make the original complaint more precise and made clear the original purpose of

[1] c. 3, Sec. 71, 28 U. S. C.
[2] c. 2, Sec. 51, § 56, 45 U. S. C.

claiming under the Federal Employers' Liability Act without changing the original cause of action. "It is true that the declaration was amended after the petition to remove . . . , but the amendment if not annecessary merely made the original cause of action more precise. On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the [petition for removal was ruled on] . . . We are not to decide whether a flaw could be picked in the declaration on special demurrer."[3]

Both from the original complaint and from its amendments it seems clear to me that plaintiff sought relief under the Federal Employers' Liability Act and that the ruling of the Court of Appeals on that ground was proper.

Second. The disposition of this case on the ground set out in the opinion does not require the statement that "If, as to the nonresident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal." Nor do I agree that this is a correct construction of the removal statute. The statement is rested on the case of *Barney* v. *Latham*, 103 U. S. 205, and opinions from two Circuit Courts of Appeals.[4] However, this Court later refused to accept the *Latham* case as authority for the proposition that the statutory right of removal "takes no account of . . . what may be the rules of practice, whether common law or statutory, of the State in which the action may be pending;" instead, it held exactly the opposite. *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206, (see argument of counsel, page 209). And in *Cincinnati and Texas Pac. Ry. Co.* v. *Bohon*, 200 U. S. 221, 225, 226 (considered and decided with the *Thompson* case), the Court stated:

"While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that

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[3] Chicago, R. I. & Pac. Ry. v. Schwyhart, 227 U. S. 184, 194.

[4] Nichols v. Chesapeake & Ohio Ry. Co. (CCA 6th, decided 1912), 195 Fed. 913; Stewart v. Nebraska Tire & Rubber Co. (CCA 8th, decided 1930), 39 Fed. (2d) 309; Des Moines Elevator & Grain Co. v. Underwriters' G. Ass'n. (CCA 8th, decided 1933), 63 Fed. (2d) 103; Culp v. Baldwin (CCA 8th, decided 1937), 87 Fed. (2d) 679 (but see 679-80).

if the action was properly joint in the form in which it was being prosecuted it could not be removed as a separable controversy under the act of Congress. We have under consideration an action for tort which by the constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. (See cases cited in *Alabama Great Southern Railway Co.* v. *Thompson, supra.*) A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

It was thus broadly held that there can be no other or separable controversy, if a plaintiff properly elects under State practice to sue defendants jointly. Even a separate defense, which may defeat a joint recovery, cannot create a separable controversy when the plaintiff has a right to make his cause of action joint.[5]

In cases which have involved the right of removal since the *Latham* case, this Court has repeatedly held that the "joint liability of the defendants [one of whom is a non-resident] under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the State before which the question could come."[6]

Only two Circuit Courts of Appeals have held that causes of action properly joined under State practice may nevertheless be separable for purposes of removal; other Circuits have followed

[5] Pirie v. Tvedt, 115 U. S. 41; Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 97; Chi., B. & Q Ry. Co. v. Willard, 220 U. S. 413.

[6] Chicago, R. I. & Pac. Ry. v. Schwyhart, *supra*, at 193 (decided 1913); Southern Ry. Co. v. Miller, 217 U. S. 209, 215, 216 (decided 1910); "The Supreme Court of the State decided that the petition stated a cause of action against Drake and the railway company, and whether it did, we said in *Chicago, Rock Island & Pacific Ry.* v. *Schwyhart*, 227 U. S. 184, was a matter of state law." Chi., Rock Island Ry. v. Whiteaker, 239 U. S. 421, 424 (decided 1915); Chi. & Alton R. R. Co. v. McWhirt, 243 U. S. 422 (decided 1917).

the decisions of this Court.[7] Cases from the two Circuits are relied upon to support the language in the opinion of the Court to which I cannot agree.[8] However, the cases relied upon from one of these two Circuits no longer appear to represent the rule even in that Circuit.[9] And the lone case in the other of the two Circuits was contrary to and decided before the most recent decisions of this Court on the subject.[10]

Third. It is, of course, true that where governing State law characterizes actionable negligence of a local and a non-resident defendant as "concurrent negligence," there can be no right of removal. However, this is but one application of the rule governing removals under which we look to State law to determine the propriety of joining two or more defendants in a single suit.[11] The opinion in the *Thompson* case, *supra*, was expressly designed to resolve the "conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly caused the injury." (at pp. 213, 214). The question

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[7] In Norwalk v. Air-Way Electric Appliance Corp., 87 Fed. (2d) 317, 319, the Circuit Court of Appeals for the Second Circuit held that "whether a separable controversy exists for the purpose of removal is determined by state law," citing the *Bohon* case and the *McWhirt* case, *supra*. To the same effect are, Johnson v. Noble, 64 Fed. (2d) 396, 398, Padgett v. Chi., R. I. & Pac. Ry. Co., 54 Fed. (2d) 576, 577, and Centerville State Bank v. Nat'l. Surety Co., 37 Fed. (2d) 338 (CCA 10th); Gulf Refining Co. v. Morgan, 61 Fed. (2d) 80, 81 (CCA 4th); see Breymann v. Penn., O. & D. R. Co., 38 Fed. (2d) 299 (CCA 6th), opinion of Hutcheson, Circuit Judge, in Lake v. Texas News Co., 51 Fed. (2d) 862, 863 (S. D. Texas) and City of Waco, Tex. v. U. S. F. & G. Co., 76 F. (2d) 470, 471 (CCA 5th).

[8] See note 4, *supra*.

[9] Other cases in the Eighth Circuit throw some degree of doubt on the Stewart and Grain Co. cases, *supra*, and indicate a disposition to determine whether liability of a defendant under allegations of a complaint is joint or severable by reference to State law. See, Harrelson v. Mo. Pac. Transportation Co., 87 Fed. (2d) 176, 178; Huffman v. Baldwin, 82 Fed. (2d) 5, 8; Watson v. Chevrolet Motor Co. of St. Louis, 68 Fed. (2d) 686, 688, 689. After the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the Circuit Court of Appeals for the Eighth Circuit seemingly was of opinion (1938) that the question of "joint liability and of the bearing thereof on the question of removability" must be determined by the law of the State. Ervin v. Texas Co., 97 Fed. (2d) 806, 809.

[10] The Nichols case, *supra*, in the Sixth Circuit, was decided in 1912; the Schwyhart case, the Whiteaker case, and the McWhirt case, in this Court, were decided in 1913, 1915, and 1917, respectively (see note 6).

[11] See, Chesapeake & Ohio R. Co. v. Dixon, 179 U. S. 131, 140; Alabama Great So. Ry. Co. v. Thompson, *supra*, 220; Chi., R. I. & Pac. Ry. v. Dowell, 229 U. S. 102, 112, 113.

mitted for decision in that case was (pp. 212, 213): "May a railroad corporation be jointly sued with two of its servants . . . though . . . not charged with any concurrent act of negligence?" This Court gave an affirmative answer.

The principle has been well stated by the Circuit Court of Appeals of the Second Circuit: . .

"Appellees contend that removal is prevented only where a master and servant are charged with concurrent negligence. The rule is settled otherwise. In Alabama Great So. Ry. Co. *v.* Thompson, supra, and Cincinnati, N. O. & Texas Pac. Ry. *v.* Bohon, supra, the master was alleged to be liable on the doctrine of respondeat superior. It is immaterial that the liability of the master and that of the servant proceed on different grounds; even more distinct were the bases of liability of the lessee and lessor railroad companies in Chicago, B. & Q. Ry. Co. *v.* Willard, . . . [220 U. S. 413] where the lessor was held on its obligation to the public of which it could not be relieved by virtue of a lease. . . . Nothing in Hay *v.* May Department Stores Co., 271 U. S. 318, . . . supports the claim that the rule of nonremovability is limited to instances of concurrent negligence."[12]

The Constitution authorizes Congress to fix the jurisdiction of Federal District Courts. The constitutional division of powers between the States and the National government makes it necessary that the jurisdictional policy declared by Congress be scrupulously observed. This is especially so in view of the fact that after removal of a cause from a State court by reason of diversity of citizenship, the Federal court must proceed under State law and practice. Questions of State constitutional, statutory and general law, which have not been clearly and finally determined by the State's highest court, may arise in the Federal court. The State court need not thereafter, in other litigation, follow the Federal court's decision on such questions. However, cases for which Congress has not authorized removal from a State court can be appealed to the State's highest judicial tribunal, thus giving each litigant a final determination of his rights under State laws by the body vested with final authority to interpret those laws. Rights and privileges under the Federal Constitution and laws, which may be involved in such litigation in a State court, can still be protected by appeal to this Court.

[12] Norwalk *v.* Air-Way Electric Appliance Corporation, *supra*, 319.

The statutory privilege of removal should be protected. But I do not believe that judicial construction should expand the statutory privilege beyond limits intended by the statute and properly recognized by this Court in previous decisions. Particularly, I think it unwise to indicate this step in a case in which decision and judgment do not require discussion of the question.